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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 683, Misc.

WILLIAM B. HARTSFIELD,
Petitioner,

v.

HONORABLE BOYD SLOAN, United States District Judge for the Northern District of Georgia,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF FOR THE UNITED STATES CONFERENCE OF MAYORS AS AMICUS CURIAE AND BRIEF FOR THE UNITED STATES CONFERENCE OF MAYORS AS AMICUS CURIAE

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Comes now the United States Conference of Mayors by its attorneys and moves, pursuant to Rule 42, for leave to file the accompanying brief as amicus curiae in the case of *William B. Hartsfield* v. *Honorable Boyd Sloan*, No. 683, Miscellaneous, October Term, 1957.

The United States Conference of Mayors (hereinafter sometimes referred to as the Conference) is an organization of Mayors of approximately 300 cities with a population of 50,000 or more. Since each member of the Conference is a duly elected incumbent Mayor of a "political subdivision of a State, Territory or Commonwealth" (Rule 42, 4) and in as much as the financial support of the United States Conference of Mayors is derived from public funds

appropriated by member cities, consent or leave for the filing of this brief amicus curiae would appear to be unnecessary under the Rule. Nevertheless, in the absence of an authoritative interpretation by this Court and in the absence of consent from respondent, the Conference has deemed it advisable to present this motion for leave to file the accompanying brief.

The United States Conference of Mayors has a direct and vital interest in this proceeding. Organized in 1934 to promote improved municipal administration throughout the United States and to secure successful local government, the Conference provides a forum for the interchange of information and experience between the major municipalities of the country and between the Government of the United States and its cities. From time to time, as appropriate occasions arise, the Conference presents the views of its members on public issues of importance to municipalities. Such a public issue arises from the Georgia County Unit Primary which has a pervasive adverse impact upon municipalities and their citizens.

In operation and effect, the Georgia County Unit Primary represents a systematic discrimination against, and continuous debasement of, the political voice and position of municipalities and their citizens. Beyond the disproportionate influence which the County Unit Primary gives to non-urban voters in federal elections, it has effected a continuing and serious burden upon the operation of the municipalities themselves. State Governments controlled by self-perpetuating rural minorities systematically discriminate against the interests of municipalities and their citizens. State action to correct this imbalance is impossible of achievement because reform legislation threatens the political power of the very officials who must pass upon it.

The Conference believes that it can make a contribution to the proper disposition of the case at bar by placing the

Georgia County Unit Primary in the larger context of urban underrepresentation. We respectfully call the Court's attention to the article by Mr. Anthony Lewis in the current Harvard Law Review (*Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057) for a demonstration of the operation, extent and effects of pervasive municipal underrepresentation.

The Conference respectfully submits that, if leave to file a brief amicus curiae is actually required by Rule 42, the Conference represents the interest and can make the contribution necessary for the granting of its motion.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES CONFERENCE OF MAYORS AS AMICUS CURIAE

The Georgia County Unit Primary gives one rural resident a vote worth more than the votes of 100 urban residents. Yet the District Judge found the equal protection issue foreclosed by the decisions of this Court. The District Court's action, if confirmed by a denial of petitioner's motion in this Court, will not only sanction systematic disenfranchisement of urban voters anywhere in the nation, but will open the door to the nullification of the Civil Rights Act of 1957. We cannot believe that this Court will take such far-reaching action without requiring a full exploration of the facts by the appropriate three-judge tribunal and without full consideration of the effect of judicial withdrawal from the broad field of voting inequity and urban disenfranchisement.

I

The Georgia County Unit Primary Nullifies The Votes of Urban Residents

The Georgia statute (Section 34-3212 through 34-3218, Georgia Code Annotated) provides for a county unit system of primary elections under which the person receiving the greatest number of votes in the county obtains the "unit-vote" of the county and the candidate with the greatest number of unit-votes becomes the nominee.[1] The eight largest counties are allotted six unit-votes each; the thirty next largest four unit-votes each; and the remaining 121 counties have two unit-votes each. The operation of this unit-vote system, which disregards the population of the counties involved in its apportionment of political voice, effects staggering discriminations between individual voters and nullifies the votes of a substantial segment of the urban population as completely as if they had been totally barred from the polls.

Eleven hundred residents of Echols County enjoy one unit-vote; 93,500 residents in Fulton County (Atlanta) represent no more than this single unit-vote. The disparity in the value of voting rights between residents of these two counties is thus 85 to 1 in favor of the residents of Echols County (Pet. 38). But the disparity is even more extreme on the basis of actual votes cast. Thus, in the gubernatorial primary in 1954, each vote cast in Chattahoochee County was equivalent to 135 votes cast in Fulton County (Pet. 40-41).

A single street, Moreland Avenue, divides Fulton County from its neighboring County of Dekalb. If a Georgia voter resides on the east side of Moreland Avenue, he has 2.9 times the voting power of his neighbor across the street.

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[1] Nomination is, of course, tantamount to election. Cf. *Terry* v. *Adams*, 345 U.S. 461.

Similarly, Clayton County adjoins Fulton County on the south. A Clayton voter by virtue of his residence one foot across the line has the same electoral influence as 11.5 voters residing one foot to the north.

Petitioner's complaint seeks invalidation of this discriminatory county-unit method of tabulating primary results. Despite the allegations in the complaint of discrimination and disenfranchisement (which we do not understand to be controverted), the District Judge refused to convene a three-judge court pursuant to 28 U.S.C. 2284 on the ground that "the federal question sought to be raised here is unsubstantial for the reason that the previous decisions of the Supreme Court of the United States foreclose the subject and leave no room for inference that the question sought to be raised can be the subject of controversy" (Pet. 25).

II

The Decisions of This Court Do Not Foreclose The Question Sought to be Raised

The only ground which we understand the District Judge or the defendants below to urge in support of the argument that petitioner's case is foreclosed by the decisions of this Court is that petitioner is presenting a "political" question unsuited for judicial adjudication. We respectfully submit that none of the decisions of this Court foreclose the issue presented here. We suggest to the Court that the divergent language in certain of the decisions can be appropriately reconciled by treating the "political-question" rule as no more than one of caution and restraint until overwhelming equities call for judicial action as they do in petitioner's case. At any rate, if any decision of this Court should be deemed to go further, we respectfully urge its reconsideration, especially in the light of the renewed Congressional concern for judicial protection of the franchise

expressed in the Civil Rights Act of 1957 and the ever-increasing disproportion of the political voice of the rural voter as against his city neighbor.

(i) Petitioner's right to have his vote cast and counted without disparagement or dilution is one which this Court has zealously protected as a right flowing from the First Article of the Constitution and the Fourteenth Amendment. See *United States* v. *Classic*, 313 U.S. 299; *Smith* v. *Allwright*, 321 U.S. 649; *United States* v. *Saylor*, 322 U.S. 385; *Terry* v. *Adams*, 345 U.S. 461. In the *Saylor* case, for example, this Court vindicated the right of a qualified voter to have his vote counted without dilution through the *private* stuffing of the ballot box; all that petitioner asks here is that his vote be counted without dilution by the *legislative* stuffing of the ballot box. It would be only "a play upon words" (*Nixon* v. *Herndon*, 273 U.S. 536, 540) to say that the question is "political" in the latter instance though not in the former. The right to have one's vote cast and counted fairly and with some modicum of equality is a personal not a political right in the sense that it runs directly to every citizen. The Constitution commits to the Judiciary the protection of the citizen of Georgia whose vote is devalued to 1/100th strength no less than the Negro barred from the polls or the citizen subjected to vote-dilution by stuffing of the ballot box. No one suggests that the Georgia legislature could baldly prescribe that everyone in "X" County should have 100 votes and everyone in "Y" County one vote. Yet that is exactly what the legislature has accomplished and it is difficult to see how the issue is more "political" in the one instance than in the other.

(ii) *Colegrove* v. *Green*, 328 U.S. 549, does not in any way preclude the relief sought by petitioner in the instant case. Indeed, a majority of the Court in *Colegrove* actually found *in favor of jurisdiction* to adjudicate the misapportionment

claim there asserted. Mr. Justice Rutledge, whose vote was decisive, found the necessary jurisdiction, but concluded that relief should be denied as a matter of equitable discretion. Nor does the opinion by Mr. Justice Frankfurter, speaking for himself and for Mr. Justice Reed and Mr. Justice Burton, preclude the exercise of jurisdiction in the instant case. Mr. Justice Frankfurter wrote: "Because the Illinois legislature has failed to revise its Congressional Representative districts in order to reflect great changes, during more than a generation, in the distribution of its population, we are asked to do this, as it were, for Illinois" (at p. 552). Mr. Justice Frankfurter declared the inability of the Court to "affirmatively remap the Illinois districts", and dismissed as unfeasible the alternative of declaring the existing electoral districts in Illinois invalid, leaving Illinois undistricted with a resulting election at large.

No problems such as those referred to by Mr. Justice Frankfurter in *Colegrove* are presented in the instant case. The Court is not being asked either to revise the make-up of Congressional Districts to reflect changing population distributions nor to grant relief which would require elections at large. This is *not* a reapportionment case; the complaint does not seek to have Georgia remapped politically [2] and the relief sought requires no more than invalidation of an extrinsic and arbitrary weighting of the already-tabulated popular vote.

Colegrove was based upon a complaint asserting that Illinois had failed to revise its Congressional Districts in conformity with population changes. In contrast, the instant case seeks the removal of an impediment to the full and fair count of the vote of petitioner and other urban

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[2] It should be noted that, despite gross inequities in Georgia's Congressional apportionment (see 71 Harv. L. Rev. 1057, 1062, n. 26), the instant proceeding seeks no relief against that misapportionment.

citizens, under a county unit system which *disregards population* in determining electoral strength and reflects a naked attempt to dilute and disparage the votes of urban citizens. This is exactly the kind of determination this Court has heretofore made and the relief sought is exactly the kind of relief which courts, not legislatures, have traditionally afforded against unconstitutional deprivation of the citizen's right to have his vote cast and counted.

(iii) Moreover, even if this were a reapportionment case, which it is not, in view of developments since *Colegrove*, it might well be that this Court would desire to reconsider the view that legislative rather than judicial action is the appropriate relief against misapportionment abuses. A recent study by Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1093, points out how far Mr. Justice Frankfurter's expectations in this regard have failed to reach fulfillment:

> "A table appended to Mr. Justice Frankfurter's opinion in *Colegrove* listed the most and least populous districts in each state in 1946. A comparison with the same figures for 1957 shows that the disparity has increased in 27 states. 10 states cannot be rated because of elections at large. In only 11 states have the congressional districts become more equitable. And all but 2 of those states were encouraged to redistrict because they lost or gained seats in the 1950 census. As to any hope for reform through the state legislatures, a state court was surely correct when it said many years ago: 'It would be idle and useless to recommit such an apportionment to the voluntary action of the body that made it.' "[3]

[3] Mr. Lewis' study (pp. 1091-1095) gives concrete examples of recent unsuccessful attempts to effect redistricting and details the historical considerations which preclude Congressional reform in the area of gerrymandering and misapportionment.

(iv) Nor does this Court's one-sentence holding in *South* v. *Peters*, 339 U.S. 276, foreclose the relief sought by petitioner. All that the majority held was that federal courts "consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions." This was clearly not a decision that federal courts have no power to act because of the "political" nature of the issues involved; it was a decision affirming the lower court's exercise of equitable discretion to refuse relief in the absence of adequately compelling reasons. Here the appropriate lower court has not exercised its equitable discretion because it has never been convened. Certainly *Peters* cannot be deemed to preclude petitioner from making a showing to the appropriate three-judge tribunal of the compelling need for judicial vindication of his right to cast a meaningful vote.

Furthermore, since the 1950 decision in *South* v. *Peters*, Congress enacted the first civil rights law in 87 years precisely in order to ensure more effective protection of the right to vote through the equity powers of the federal courts. It is "fair to say that in all this Congress expressed a mood . . . not merely by oratory but by legislation." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488. The Civil Rights Act of 1957 expressed the view of Congress and the American people that the right to vote, whether or not denominated "political", should have the fullest protection in federal courts of equity.

Not only does the Civil Rights Act of 1957 express an important change in "mood" since *South* v. *Peters*, but it also presents new issues that should not hastily be resolved. With direct disenfranchisement now subject to more effective prevention, indirect disenfranchisement through means such as those here under consideration becomes the more likely. We would strongly urge the Court not to foreclose these questions at this stage of our electoral development.

CONCLUSION

Petitioner alleges that he has "no effective recourse against the dilution of his vote and against the cited disparities and inequalities of the County Unit System in the nature of legislative action, inasmuch as the composition of the lower House of the General Assembly of Georgia is the basis upon which the County Unit System is patterned . . . and it cannot reasonably be anticipated that the members thereof, exercising the same degree of control over the affairs of the House of Representatives as their respective counties exercise in the nomination of candidates to statewide offices in Primary elections, will be inclined voluntarily to diminish their own political influence or that of their constituents" (Pet. 41-42). Simply stated, the county unit system carries its own built-in self-perpetuation, just as do so many of the other disenfranchisements of urban voters. To denominate such an issue as "political" is to hold forth illusory hopes of reform through elective channels. *Cf. United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n. 4.

Nor is Congress the appropriate forum for resolving the issues raised by the Georgia County Unit Primary. The question is not one of Congressional apportionment; it is a simple question of disenfranchisement of urban voters. There is certainly as much reason for judicial intervention to protect the right to vote here as there is for Congressional intervention. Congressional power alone does not cause this Court to stay its hand. *Cf. Brown* v. *Board of Education*, 347 U.S. 483. And, of course, as a matter of political reality, Congressional intervention is not a realistic solution. For this Court to fail to recognize that the federal courts alone can rectify the disenfranchisement of urban voters in Georgia, it "would have to be that 'blind' Court, against which Mr. Chief Justice Taft admonished in a famous passage, *Bailey* v. *Drexel Furniture Co.* . . . that does not

see what 'all others can see and understand' . . ." *United States* v. *Rumely*, 345 U.S. 41, 44.

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We urge the Court to grant petitioner a full hearing on the facts and the benefit of mature consideration of the legal issues before the appropriate three-judge tribunal. We respectfully suggest to the Court that such a remand would not constitute a binding precedent requiring judicial intervention in this area. On the other hand, a denial of petitioner's motion would confirm the action below and, without hearing or full consideration, foreclose judicial remedies in a field so close to the heart of the democratic process.

It is respectfully urged that petitioner's motion be granted.

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